RECORD AND BRIEFS

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No. 16-373

IN THE

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioner,

v.

ANZ SECURITIES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE SRM GLOBAL MASTER FUND LIMITED PARTNERSHIP IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae SRM Global Master Fund Limited Partnership is a private investment fund that invests in a variety of asset classes on behalf of dozens of investors in the United States and around the world, including major international institutions and pension funds. As a major investor with a long-term investment outlook, amicus is concerned with the proper and efficient functioning of U.S. capital markets.

Like Petitioner, amicus has been harmed by the decision of the Court of Appeals for the Second Circuit in *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom. Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014) ("*IndyMac*"). SRM had been an absent class member of a class action lawsuit against Bear Stearns, *Eastside Holdings Inc. v. Bear Stearns Cos.*, 08-cv-2739 (S.D.N.Y.), since that case was filed on March 17, 2008, years before the expiration of any applicable limitary periods. SRM timely opted out effective November 29, 2012 and filed an individual complaint asserting Section 10(b) claims less than five months later on April 24, 2013, four years and 214 days before expiration of the five-year limitary period under Section 1658(b)(2) under the tolling rule of *American*

1. Letters from the Petitioner and Respondents consenting generally to the filing of briefs by amici curiae are on file with the Court. No person other than amicus or its counsel authored this brief in whole or in part, and no person other than amicus and its counsel contributed any money toward the preparation or submission of this brief.

Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974). Two months later, the Court of Appeals decided *IndyMac*, holding that *American Pipe* tolling did not apply to the repose period in Section 13 of the Securities Act of 1933. 721 F.3d 95 at 101. In *SRM Global Master Fund Ltd. Partnership v. Bear Stearns Cos.*, 829 F.3d 173 (2d Cir. 2016), for which a petition for a writ certiorari remains pending before the Court, the Court of Appeals extended *IndyMac*'s holding to Section 1658(b)(2), the repose period governing SRM's Securities Exchange Act claims, and dismissed SRM's opt-out lawsuit as untimely. *Id.* at 177. The Court of Appeals' retroactive extension of *IndyMac* effectively eliminated SRM's post-certification opt-out right from a class settlement in which SRM would have received nothing notwithstanding the fact that it incurred more than $200 million in losses as a result of securities fraud by Bear Stearns. This deprived SRM of its day in court and its right to be compensated for its losses under the federal securities laws.

The *American Pipe* rule is a fundamental part of the procedural framework for litigating securities class actions. The Court of Appeals' decisions in this case, in *IndyMac*, and in amicus's own case have impaired the effective functioning of class action litigation and the rights of individual class members, including their right to opt out of a class action and pursue claims through individual actions. Amicus is concerned that, if the *American Pipe* rule were held to be inapplicable to the three-year repose period under Section 13 of the Securities Act, 15 U.S.C. § 77m, and comparable statutes including 28 U.S.C. § 1658(b)(2), amicus would be forced into wasteful and duplicative litigation as a protective measure whenever, as is often the case, a limitary period

approaches with no decision on class certification. The result would be additional costs for all involved, including defendants and the courts, with no compensating benefits to any of the interests Congress was trying to protect in enacting any statute of repose. Accordingly, amicus urges the Court to reverse.

SUMMARY OF ARGUMENT

This case presents a critical question regarding the application of this Court's tolling rule in *American Pipe* to the limitary periods contained in Section 13 of the Securities Act and Section 1658(b)(2) of Title 28, applicable to Securities Exchange Act claims.[2] *American Pipe* held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been

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2. Amicus assumes for the purposes of this brief that the three- and five-year limitary periods in Sections 13 and 1658(b)(2), respectively, are statutes of repose. Petitioner has capably argued in its own brief that Section 13 is a statute of limitations and is subject to *American Pipe* tolling on that basis. Similarly, it is amicus's position that nothing in the plain language of Section 1658(b) suggests that the five-year limitary period in Section 1658(b)(2) is less susceptible to *American Pipe* tolling than that the two-year statute of limitations in Section 1658(b)(1). *See Corman, Limitations of Actions* §1.3.2.1 at 30-31 (1991) (various definitions of statutes of repose include the following: (1) "it is merely one type of statute of limitation" that places a cap or outer limit on a statute; (2) "a statute of repose is considered distinct from a statute of limitation because it begins to run at a time unrelated to the traditional cause of action"). However, for the reasons explained herein, it is amicus's position that *American Pipe* tolling applies to all limitary periods regardless of whether they are labeled statutes of limitations or statues of repose.

permitted to continue as a class action." 414 U.S. at 554. As the Court stated, this rule is "consistent both with the procedures of Rule 23 and with the proper function of the limitations statute." 414 U.S. at 555. The Court's reasoning in *American Pipe* applies equally to repose periods like those in Section 13 and Section 1658(b)(2).

The Court of Appeals for the Second Circuit rejected this conclusion and determined that application of *American Pipe* tolling to statutes of repose would violate the Rules Enabling Act, 28 U.S.C. § 2072(b), by improperly allowing Rule 23 to abridge substantive rights created by a statute of repose. *See In re Lehman Bros. Sec. & ERISA Litig.*, 655 F. App'x 13, 15 (2d Cir. 2016); *SRM Global Master Fund*, 829 F.3d at 176-77 (same). The Court of Appeals based its holdings on its earlier determination in *IndyMac* that statutes of repose create a substantive right to be free from liability after a legislatively determined period of time. 721 F.3d at 106. According to the Court of Appeals, applying *American Pipe* tolling to permit the filing of a complaint after the repose period had run would "necessarily enlarge or modify a substantive right and violate the Rules Enabling Act." *Id.* at 109. However, this analysis is based upon an incorrect premise. For purposes of analyzing the Rules Enabling Act, it makes no difference whether statutes of repose create substantive rights. The Court of Appeals erred in at least three ways in concluding otherwise.

First, the Court of Appeals failed to analyze the applicability of *American Pipe* tolling to a statute of repose under the legal standard for the Rules Enabling Act set forth by this Court in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), and *Shady Grove Orthopedic Associates, P.A.*

v. Allstate Insurance Co., 559 U.S. 393 (2010) (plurality opinion). Under this standard, it simply "makes no difference" whether a statute of repose creates substantive rights. *Shady Grove*, 559 U.S. at 409. The only relevant question is whether Rule 23, as interpreted by *American Pipe*, "really regulates procedure," *Sibbach*, 312 U.S. at 14; *Shady Grove*, 559 U.S. at 411, which it plainly does. *American Pipe* supplies the definition for what it means for a case to be "brought" within the applicable limitary period. Accordingly, following *Sibbach* and *Shady Grove*, application of *American Pipe* tolling to statutes of repose such as those in Section 13 and Section 1658(b)(2) does not violate the Rules Enabling Act. The Court of Appeals did not address this issue.

Second, application of *American Pipe* tolling to the repose periods of Sections 13 and 1658(b)(2) would not violate the Rules Enabling Act because "Rules which *incidentally* affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 552 (1991) (internal quotation omitted). This Court has repeatedly recognized that failure to apply *American Pipe* tolling "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *American Pipe*, 414 U.S. at 553; *accord Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349-52 (1983). Since *American Pipe* tolling is consonant with the purposes of the repose periods in Sections 13 and 1658(b)(2) and does not enlarge a defendants' potential liability, its effect on any rights created by those statutes is, at most, incidental. The Court of Appeals did not address this issue.

Finally, *American Pipe* itself rejected the proposition that the Rules Enabling Act prohibits any application of a rule that might be said to affect substantive rights. 414 U.S. at 557-58. Under *American Pipe*, the question "is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *Id.* In *IndyMac*, the Court of Appeals inexplicably misconstrued this standard as applying only where the relevant time limitation is "procedural." 721 F.3d at 109 n.17. Here, application of *American Pipe* to the repose periods in Sections 13 and 1658(b)(2) is fully consonant with the language and purpose of the limitary periods applicable to Securities Act and Exchange Act claims and to the federal securities laws generally. The Court of Appeals did not address this issue.

For all of these reasons, application of *American Pipe* tolling to the repose periods contained in Section 13 and Section 1658(b)(2) does not violate the Rules Enabling Act. This Court should reverse the Court of Appeals' contrary decision.

ARGUMENT

I. *American Pipe* Tolling Does Not Violate the Rules Enabling Act Because It Regulates Procedure.

For over seven decades, this Court has used a test with a single criterion to determine whether a Federal Rule violates the Rules Enabling Act: "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and

redress for disregard or infraction of them." *Sibbach*, 312 U.S. at 14; *accord Hanna v. Plumer*, 380 U.S. 460, 464 (1965); *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 8 (1987).

In *Sibbach*, the Court rejected a challenge to the validity of Federal Rules of Civil Procedure 35 and 37. The district court ordered Mrs. Sibbach, a personal injury plaintiff, to submit to a physical examination under Rule 35, and it held her in contempt under Rule 37 when she refused. 312 U.S. at 4-5, 14-16. Mrs. Sibbach argued that although Rules 35 and 37 were nominally procedural, they violated the Rules Enabling Act because they abridged her substantive right to be free from physical invasion. *Id.* at 10-14. The Court rejected the Rules Enabling Act challenge, concluding that the procedural nature of Rules 35 and 37 was the deciding factor, not whether any substantive right had been abridged. *Id.* at 14. As the Court stated, "[t]he test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Id.*

Most recently in *Shady Grove,* Justice Scalia, writing for the plurality,[3] noted that "*Sibbach* has been settled

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3. *Shady Grove* involved a conflict between a federal rule (Fed. R. Civ. P. 23) and a state rule (N.Y. C.P.L.R. § 901(b)). This case is therefore easier than *Shady Grove* because it does not involve such a conflict. The federalism concerns that were largely responsible for dividing the Court in *Shady Grove* are not present here. *See Shady Grove*, 559 U.S. at 424-25 (Stevens, J., concurring in part and in the judgment, and observing that Justice Scalia "ignores the balance that Congress struck between uniform rules

law . . . for nearly seven decades" and that its "governing rule" focusing "on the Federal Rule as the proper unit of analysis[] is alive and well." 559 U.S. at 413 & n.12. In *Shady Grove*, a medical facility brought a federal class action against Allstate Insurance for statutory interest payments required under New York law because of Allstate's failure to make timely payments of claims. However, New York law, C.P.L.R. Section 901(b), also precluded a plaintiff from maintaining a class action seeking statutory penalties. *Id.* at 401. Allstate challenged the application of Rule 23 under the Rules Enabling Act, arguing that applying Rule 23 would abridge its right under New York law to be protected from class actions seeking recovery of statutory penalties. *Id.*

A majority of this Court rejected Allstate's argument, concluding that Rule 23 did not violate the Rules Enabling Act because Rule 23 "really regulates procedure." *Id.* at 410. The plurality explicitly reaffirmed and followed the *Sibbach* test: "*Sibbach* adopted and applied a rule with a single criterion: whether the Federal Rule really regulates procedure." *Shady Grove*, 559 U.S. at 411 (internal quotations omitted). As Justice Scalia explained:

> The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself regulates: If it governs only the manner and the means by which the litigants' rights are enforced, it is valid; if it alters the rules of decision by which the court will adjudicate those rights, it is not.

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of federal procedure and respect for a State's construction of its own rights and remedies").

Id. at 407 (internal quotations, alterations, and citation omitted). The fact that an individual application of a Rule might affect a litigants' substantive rights "*makes no difference*" to the question of whether it is permitted under the Rules Enabling Act. *Id.* at 409.

Applying the *Sibbach* test, this Court has rejected every statutory challenge to a Federal Rule that has come before it. *Id.* (collecting cases). By focusing on the issue of whether a statute of repose confers a substantive right, the Court of Appeals, in this case, in amicus's own case, and in *IndyMac* on which both relied, simply ignored the only relevant criterion under *Sibbach*. The Court of Appeals' position was also flatly rejected by the plurality in *Shady Grove*. *Id.* at 411. It is not the substantive or procedural nature of the displaced law that matters, but the substantive or procedural nature of the Federal Rule: "We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure." *Id.* at 410. The Court of Appeals ignored this directive.

Following *Sibbach*, the application of *American Pipe* tolling to statutes of repose does not violate the Rules Enabling Act. For example, Section 13 of the Securities Act requires that a private right of action involving fraud in a registration statement be "brought" no later than (1) one year after the untrue statement or omission was discovered or should have been discovered or (2) three years after the security was offered to the public. 15 U.S.C. § 77m. Similarly, Section 1658(b)(2) requires that a private action for fraud under Section 10(b) be "brought" not later than the earlier of (1) two years after the discovery of the facts constituting the violation or (2) five years after such

violation. 28 U.S.C. § 1658(b)(2). Neither Section 13 nor Section 1658(b)(2), however, define what it means for an action to be "brought," which is a matter of procedure. *Cf.* Fed. R. Civ. P. 3 (action "commenced" by filing of complaint).

For a class action, Rule 23 as interpreted by *American Pipe* supplies the applicable standard: "the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." *American Pipe*, 414 U.S. at 550. The commencement of a timely class action satisfies the "limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs." *Id.* at 551. Any requirement for "individualized satisfaction of the statute of limitations by each member of the class" was eliminated by adoption of Rule 23. *Id.* at 550. If class certification is denied or class members opt out, they can file a separate action "within the time that remains on the limitations period." *Crown, Cork*, 462 U.S. at 346-47.

American Pipe tolling governs the "manner and the means" by which class members' rights are enforced. *Shady Grove*, 559 U.S. at 407. It does not alter the rules of decision—Section 11 in Petitioner's case, and Section 10(b) in amicus's case—by which a court will adjudicate those rights. As such, it "really regulates procedure," *Sibbach*, 312 U.S. at 14, and therefore does not violate the Rules Enabling Act. This is true even if, as the Court of Appeals erroneously concluded, it affects a litigant's substantive rights, as "most procedural rules do." *Shady Grove*, 559 U.S. at 407. That simply "makes no difference" as to whether the Rules Enabling Act is violated. *Id.* at 409.

II. *American Pipe* Tolling Is Necessary to Maintain the Integrity of Rule 23 and Has Only an Incidental Effect on the Federal Securities Laws.

Even if the limitary periods in Sections 13 and 1658(b)(2) were held to create substantive rights under the Rules Enabling Act, any effects on those rights under *American Pipe* tolling are merely incidental and would accordingly not violate the Rules Enabling Act. In *Burlington Northern*, "the Court considered the Act's proscription against interference with substantive rights and held, in a unanimous decision, that 'Rules which *incidentally* affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules.'" *Bus. Guides*, 498 U.S. at 552 (quoting *Burlington Northern*, 480 U.S. at 5)); *and see* 19 Wright & Miller, *Fed. Prac. & Proc. Juris.* § 4509 (2d ed.) ("If incidental impingements on substantive rights were sufficient to render a Civil Rule inoperative, the very objective of the Enabling Act and the Rules themselves would be imperiled. . . . Whatever may be the appropriate construction of 'abridge, enlarge or modify,' presumably it must accommodate the goal of establishing a comprehensive system of procedure and allow for such impingements of substantive rights as are reasonably incidental to significant procedural objectives.").

Accordingly, this Court has consistently held that Federal Rules do not violate the Rules Enabling Act, even if they affect a party's rights, where such effects were "incidental." *See, e.g., Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 445-46 (1946) (although Rule 4(f) "undoubtedly" affected defendant's rights, "such incidental effects" "relate[] merely to 'the manner and the means by

which a right to recover is enforced'" (alterations omitted)); *Bus. Guides*, 498 U.S. at 548, 551-52 (Rule 11 sanctions did not violate the Rules Enabling Act because any "effect on substantive rights" to be free from sanctions except upon finding of bad faith was "incidental"); *Burlington Northern*, 480 U.S. at 4 (Fed. R. App. P. 38 discretionary penalties for frivolous appeals only incidentally affect appellee's right under Alabama statute to a mandatory ten percent penalty). Here, *American Pipe* merely regulates when an action is commenced, and as explained in Section III, *infra*, it does so in a manner that is fully consonant with the purposes of repose periods like those in Section 13 and Section 1658(b)(2). In addition, in both Petitioner's and amicus's cases, the individual claims were entirely encompassed by the indisputably timely operative class action complaints, so the defendants' potential liability was not enlarged. Therefore, the effect of *American Pipe* tolling on any rights created by Sections 13 and 1658(b)(2) in these cases is, at most, incidental. Focusing only on the "substantive" label applied to statutes of repose, the Court of Appeals erred by failing to consider these precedents.

American Pipe tolling is also "reasonably necessary to maintain the integrity" of Rule 23 class action procedure. *Burlington Northern*, 480 U.S. at 5. As this Court has explained, without *American Pipe* tolling, the "principal purposes of the class action procedure—promotion of efficiency and economy of litigation—would thereby be frustrated." *Crown, Cork*, 462 U.S. at 349. "[C]lass members would not be able to rely on the existence of the suit to protect their rights," *id.* at 350, as "Rule 23 both permits and encourages class members" to do, *id.* at 352, forcing them to intervene or take other action. "The result would be a needless multiplicity of actions—precisely the

situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 351. This rationale applies no less to the three- and five-year limitary periods contained in Sections 13 and 1658(b)(2) than it does to their one- and two-year limitary periods.

Finally, as this Court has recognized, *American Pipe* tolling is necessary in order to provide class members with a meaningful ability to opt out under Rule 23. Without *American Pipe* tolling, "a class member would be unable to press his claim separately if the limitations period had expired while the class action was pending." *Id.* (internal quotation omitted). This Court has "concluded that the right to opt out and press a separate claim remained meaningful because the filing of the class action tolled the statute of limitation under the rule of *American Pipe*." *Id.* at 351-52. Indeed, this is why the Court expressly extended *American Pipe* "to apply to class members," like Petitioner and amicus, "who choose to file separate suits." *Id.* at 352. This important purpose of *American Pipe* tolling applies regardless of whether statutes of limitation or statutes of repose are involved.

American Pipe tolling of the statutes of repose applicable to the federal securities laws is "reasonably necessary to maintain the integrity" of Rule 23 and only "incidentally" affects any rights afforded to a defendant under those laws. Respondents cannot overcome this "substantial hurdle[]." *Bus. Guides*, 498 U.S. at 552.

III. *American Pipe* Tolling is Consonant With the Legislative Scheme of Sections 13 and 1658(b)(2) and the Federal Securities Laws Generally.

American Pipe rejected the premise that the Rules Enabling Act prohibits any tolling of a limitary period that can be said to be "substantive." 414 U.S. at 557-58. According to *American Pipe*, the issue "is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *Id.* The "mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Id.* at 559. In *IndyMac*, the Court of Appeals concluded that this standard only applies where the given limitary period is procedural, so it refused to apply this precedent, having found that three-year limitary period in Section 13 was substantive. 721 F.3d at 109 n.17. But this conclusion is directly at odds with *American Pipe*, which plainly states that the substantive or procedural nature of the limitary period does not matter. 414 U.S. at 557-58.

Applied here, the question is whether *American Pipe* tolling of limitary periods in Sections 13 and 1658(b)(2) is consonant with the legislative scheme. If it is, then the application of *American Pipe* tolling invades no substantive right of a defendant but rather reflects that Congress never intended defendants to be free from liability to class members whose claims were timely filed under the rule. Applying this standard, *American Pipe* is entirely consonant with the limitations schemes underlying the Securities Act and the Securities Exchange Act.

Beginning with the statutory text, Section 13 requires that any Section 11 action "be brought" within three years after the security was offered to the public. 15 U.S.C. § 77m. Section 1658(b)(2) similarly provides that a fraud claim must "be brought" within five years of the violation. 28 U.S.C. § 1658(b)(2). "'Brought' in this context means 'commenced[.]'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1568 (2016) (quoting *Black's Law Dictionary* (3d ed. 1933)). And in *American Pipe*, this Court held that "a timely class action complaint commences the action for all members of the class as subsequently determined." 414 U.S. at 550. That interpretation of Section 13 and Section 1658(b)(2) is supported by the provision's use of the passive voice—"be brought"—which encompasses a representative bringing a suit on another's behalf. By refusing to address the question more specifically than that, Congress left it to the courts to decide how repose periods would apply to representative actions (including class actions). *American Pipe* took up that responsibility, answering the question by sensibly considering the rules governing, and purposes behind, class action litigation.

Furthermore, the text of Section 13 and Section 1658(b)(2) does not expressly extinguish or confer any rights, nor does it forbid tolling. Those statutes merely state when actions may be "brought." In fact, the language of these provisions is arguably less absolute than the Clayton Act's limitations provision at issue in *American Pipe*, which stated that an action "shall be forever barred" if not commenced in time. 15 U.S.C. § 15b. If that language did not extinguish rights, it is difficult to see why the language of Section 13 or Section 1658(b)(2) should do so.

Applying *American Pipe* to Section 13 and Section 1658(b)(2) is also consistent with the legislative purposes of the Securities Act and the Exchange Act and the limitary periods that apply to claims brought under them. "Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, but these ends are met when a class action is commenced." *Crown, Cork*, 462 U.S. at 352 (citation omitted). Moreover,

> a class complaint "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." The defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class.

Id. (quoting *American Pipe*, 414 U.S. at 555).

"Statutes of repose also encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014). In addition, statutes of repose "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." *Id.* (internal quotation omitted). *American Pipe* is entirely consonant with these purposes because it guarantees that after the limitations period has expired, no liability will be imposed beyond that claimed in lawsuits commenced on or before that date. Statutes of repose do not, after all, serve *different* policies than statutes of limitations—to the extent there is a legal difference, statutes of repose simply

permit fewer exceptions to those policies. *See id.* In fact, *CTS Corp.* identified only two differences between statutes of limitations and statutes of repose, and neither suggests *American Pipe* is any less consonant with the purpose of statutes of repose. *Id.* (observing that (1) statutes of limitations run from the accrual or discovery of a claim, and (2) statutes of limitation are subject to equitable tolling, whereas statutes of repose are not). *American Pipe* itself said that tolling limitations periods during the pendency of a class action "fulfilled the policies of *repose* and certainty inherent in the limitation provisions." 414 U.S. at 558 (emphasis added).

Of course, litigation over timely filed claims may well continue long after the period of repose has expired. There can be no argument, for example, that the policy of repose is not violated when a defendant is held liable to members of a timely filed class action in a case which is certified after the applicable limitary period has run. But the purpose of a statute of repose is not to provide defendants complete certainty as to the scope of their liability, but instead to fix the *outer limit* of their *potential* liability. *American Pipe* simply informs defendants that this outer limit includes possible liability to members of putative class actions filed within the limitary period of the statute of repose. Whether that liability is resolved through a certified class action or through individual suits by class members is irrelevant as far as the policies underlying the statute of repose are concerned. Accordingly, there is simply no conflict between the interests protected by statutes of repose, like those in Section 13 and Section 1658(b)(2), and the operation of *American Pipe* tolling.

American Pipe is also consonant with the purposes of the federal securities laws. Indeed, Congress appears to have presumed *American Pipe*'s applicability in the Private Securities Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (1995) (" PSLRA"). That statute "made several important changes" to securities litigation practice, but "it pointedly did not change the requirements of Rule 23" and "incorporated Rule 23 explicitly in one portion of the statute." *In re Cavanaugh*, 306 F.3d 726, 738-39 (9th Cir. 2002) (citing 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc)). For example, the PSLRA sets forth provisions for selection of a lead plaintiff in class litigation. Those provisions, which often take longer to play out than the time allotted by a limitations or repose period, cannot operate effectively without tolling.[4] Accordingly, given Congress's express incorporation of Rule 23 in the PSLRA, it is plausible to conclude that Congress also intended to incorporate *American Pipe*'s interpretation of that Rule as well.

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4. Under the PSLRA's lead-plaintiff selection provisions, there is a 90-day notice period after which a court reviews applications, determines the losses of the applicants, evaluates whether the applicant with the greatest losses meets other Rule 23 requirements, and repeats that process as necessary until it finds a plaintiff who is both willing to serve and satisfies all Rule 23 requirements. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Finally, the court must then afford other plaintiffs an opportunity to rebut the lead plaintiff's Rule 23 showing, and the PSLRA provides for discovery as part of that process. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II); 15 U.S.C. § 78u-4(a)(3)(B)(iv). This process may take substantial time.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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